

**COMBINED WRITTEN STATEMENT OF
THE HONORABLE M. MARGARET McKEOWN
UNITED STATES CIRCUIT JUDGE FOR THE NINTH CIRCUIT**

AND

**THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS**

ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

**BEFORE THE
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES**

**“WORKPLACE PROTECTIONS FOR FEDERAL JUDICIARY EMPLOYEES:
FLAWS IN THE CURRENT SYSTEM AND THE NEED FOR STATUTORY CHANGE”**

March 17, 2022

INTRODUCTION

I am Judge Margaret McKeown, a United States Circuit Judge for the Ninth Circuit. I am accompanied by Judge Julie A. Robinson, a United States District Judge for the District of Kansas. We are members of the Workplace Conduct Working Group established under the leadership of Chief Justice Roberts, who in 2018, called for swift action to address workplace concerns. Thank you for the invitation to be here today on behalf of the Judicial Conference of the United States.

The federal Judiciary is committed to the well-being of its employees and to an exemplary workplace by ensuring a safe, respectful, and professional environment free from discrimination, harassment, abusive conduct, and

retaliation. Over the past four years, the Working Group has, in consultation with Judiciary employees, law clerks, outside experts, and interested groups recommended more than thirty changes to the Judiciary’s policies and procedures—all of which have been adopted by the Judicial Conference.

These include increasing the scope of employee protections, strengthening the obligations of judges and Judiciary employees to report misconduct or take other appropriate action, and improving the processes for reporting and addressing reports of misconduct. Every Judiciary employee has clear and multiple avenues to obtain confidential advice, report misconduct, and seek and receive remedial action.

These improvements are a result of leadership – a key imperative for creating a safe workplace. Engaged leadership by chief judges and the heads of each court unit sends a powerful signal to our community that everyone must support a safe and civil workplace.

JUDICIARY EMPLOYEES HAVE PROTECTIONS

To begin, Judiciary employees are protected from discrimination (based on, race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age (40 years and over), and disability); sexual, racial, and other discriminatory harassment; retaliation; as well as abusive conduct.

The Judiciary provides expanded protections against abusive conduct, based

on the Working Group’s finding that while inappropriate conduct is not pervasive, incivility, disrespect, or abusive behavior is more common than sexual harassment. Abusive conduct is defined as “a pattern of demonstrably egregious and hostile conduct not based on a protected category that unreasonably interferes with an employee’s work and creates an abusive working environment.”

Judiciary employees are protected by at least ten employment laws and policies:

- Title VII, Civil Rights Act of 1964, as amended and codified in 42 U.S.C. §§ 2000e-2- 2000e-3, 2000e-16(a);
- Age Discrimination in Employment Act of 1967, as codified in 29 U.S.C. §§ 623 and 633a;
- the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12102, 12111-12114, as amended by the Americans with Disabilities Act Amendments Act of 2008;
- the Rehabilitation Act of 1973;
- Family and Medical Leave Act of 1993;
- Uniformed Services Employment and Reemployment Rights Act of 1994;
- Worker Adjustment and Retraining Notification (WARN) Act, codified at 29 U.S.C. § 2101;
- Occupational Safety and Health Act of 1970, as amended;
- the Employee Polygraph Protection Act of 1988 (EPPA), codified at 29 U.S.C. §§ 2001-2009;
- and whistleblower protections.

Judiciary whistleblower protections require that any Judiciary personnel with authority to take, direct others to take, recommend, or approve any personnel action may not use such authority to take or threaten to take an adverse employment action against an employee because of any disclosure of specified information. These protections make clear that retaliation against a person who reveals or reports wrongful conduct is itself wrongful conduct.

IMPROVEMENTS

Second, we have improved workplace protections and procedures. Revised Model Employment Dispute Resolution (EDR) plans are in place for courts and federal public defender organizations. The Model EDR Plan included enhanced policy protections, covers all paid and unpaid employees, provides specific informal avenues for reporting and addressing wrongful conduct, and provides a more streamlined formal complaint process that allows for more time to file a formal claim. A new Model Federal Public Defender Organization (FPDO) EDR Plan was developed and approved by the Judicial Conference, designed to address the issues unique to the FPDO community, including: the distinct employment relationship between the federal public defenders and their employees; their role as legal representatives with ethical obligations to clients on whose behalf they appear in court; and the need to mitigate concerns regarding access to sensitive information.

The Code of Conduct for United States Judges makes clear that “a judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct.” Codes of Conduct confidentiality obligations were updated to remove barriers to reporting and to emphasize the responsibility of all judges and Judiciary employees to “take appropriate action upon receipt of reliable information indicating a likelihood” of misconduct. Confidentiality provisions for law clerks were revised to clarify that they do not prohibit reports of misconduct by judges, supervisors, or any Judiciary employee. Improved guidance ensures that judges and employees understand that confidentiality obligations should never prevent any employee – including a law clerk – from revealing abuse or reporting misconduct by any person.

Judicial Conduct and Disability (JC&D) rules clarify that discrimination, harassment, abusive behavior, and retaliation are cognizable misconduct and added that a bystander judge’s failure to report is also cognizable misconduct. Specifically, JC&D Rules and Commentary (1) require Judges to report or disclose misconduct; (2) expressly prohibit sexual and other discriminatory harassment (intentionally discriminating on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability), abusive conduct, and retaliation; (3) exempt reports of misconduct from

confidentiality rules; (4) clarify eligibility to file a JC&D complaint; (5) improve transparency through expanded disclosure provisions; and (6) authorize the Judicial Conference and judicial council of a judge who is the subject of a complaint to conduct systemic evaluations affirming they have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote “the expeditious conduct of court business.”

EXPANDED NETWORK OF TRAINED PROFESSIONALS

A network of trained professionals, including local, circuit, and national workplace specialists, are now available to provide confidential guidance and assistance to all Judiciary employees. These professionals are expert in matters of workplace conduct and are outside of the traditional court chain of command to support and provide services to both employees and employing offices. The national Office of Judicial Integrity (OJI) at the Administrative Office of U.S. Courts, Directors of Workplace Relations (DWR) in each circuit, and EDR Coordinators in each employing office and court are all able to assist employees with a broad range of workplace conduct concerns.

The OJI was established to, among other duties, provide independent, confidential advice on workplace conduct; outreach to future, current, and former Judiciary employees and law clerks; and analyze workplace issues and trends. Workplace conduct committees and DWRs provide circuit-wide guidance and

oversight of workplace conduct matters. The DWRs, among other duties, offer workplace conduct training; give confidential guidance to employees and managers about conduct issues; provide advice, training and assistance to court EDR Coordinators; and assist with workplace conduct investigations, mediation, and dispute resolution.

New requirements in the Model EDR Plan have helped to ensure that every court and employing office has at least two trained and certified EDR coordinators to give employees additional avenues to report issues and seek advice. An online training course must be taken and passed by EDR coordinators in order to become certified, and over 400 individuals have been certified to date. The EDR Handbook provides detailed explanations for each of the EDR options for resolution, step-by-step directions for each process, information about the remedies available under the EDR Plan, proactive and responsive steps for safeguarding the rights and protections afforded under the EDR Plan, and more.

This multi-layer network of dedicated personnel – at the national, circuit, and local court levels – is available to provide confidential and impartial advice and guidance to Judiciary employees, managers, and judges. Together, they support and facilitate EDR processes; coordinate training programs; propose and assist in the implementation of policy initiatives; and collaborate on best practices to foster consistency across the circuits and courts

CLEAR AND MULTIPLE AVENUES TO REPORT

Next, we have streamlined our procedures and made it easier for employees to seek confidential help and report misconduct, while enhancing impartiality and protecting confidentiality. We took to heart the EEOC's advice regarding the importance of multiple avenues for reporting. Employees are free to contact whomever they feel most comfortable with and often coordinate with more than one resource, within or outside their employing office, including local court and circuit-level positions, as well as managers, unit executives, human resources staff, or judges. Employees can also report anonymously through an online reporting portal.

In addition to multiple avenues to report, we have expanded the paths for employees to raise concerns, choosing the option(s) that best fit their needs and comfort level – informal advice, assisted resolution, or formal complaint.

Robust informal processes provide valuable flexibility for employees to address workplace concerns, while retaining the option of filing a formal complaint. In some circumstances, an employee may seek informal advice – confidential guidance on an employee's rights and options. "Assisted Resolution" provides an interactive and flexible option to address concerns, without the need for rules, deadlines, or other fixed parameters. This might include facilitated discussions with the source of the conduct, voluntary mediation, preliminary

investigations including interviewing witnesses, and/or seeking a mutually agreeable resolution.

The incorporation of informal advice and assisted resolution has provided additional opportunities for reporting as indicated by the increased use of these processes and has allowed issues to be resolved more quickly. The DWRs report that more time is spent on confidential informal advice than anything else, and that these interactions involve a range of workplace issues, not just harassment. Those confidential conversations have provided opportunities for a variety of interventions that would not have been possible if employees were uncomfortable coming forward or were limited to filing a Formal Complaint.

The formal complaint process has been revised in recent years to be more approachable and provides well-defined procedures through which workplace conduct issues are heard by an impartial federal judge. The formal complaint process includes mechanisms for the investigation of allegations and holding hearings for disputed issues. Parties have the right to be represented by counsel and a resulting decision can be appealed to the Circuit Judicial Council.

When misconduct allegations involve a judge, employees have the option to file a complaint through either of both the EDR process and the JC&D process, providing mechanisms for seeking both employment-based remedies and specific accountability for judicial misconduct, respectively.

TRAINING

Fifth, we have emphasized training at all levels to ensure employees are aware of their rights and protections. EDR training sessions, orientation sessions, management training, and educational programs all contribute to transforming the workplace culture and highlighting the responsibilities of employees and judges to promote and ensure an exemplary workplace.

All courts and employing offices must conduct annual training for all Judiciary employees and judges on workplace conduct protections and processes. A recent virtual training series in November and December 2021 was viewed live by over 6,000 employees and judges, and another tailored for chambers staff was attended by nearly 100 staff, including law clerks and judicial assistants.

The Federal Judicial Center (FJC) plays an instrumental role in education and has implemented training recommendations made by the Working Group: (1) ensure that all new judges and new employees receive basic workplace standards training as part of their initial orientation programs, with refresher training at regular intervals; (2) develop an advanced training program aimed at developing a culture of workplace civility; and (3) continuously evaluate the effectiveness of workplace conduct educational programs. The FJC has prioritized education on workplace conduct issues and has broadened the availability and scope of its programs. The FJC integrates workplace conduct-related scenarios and

discussions into all of its leadership-oriented programs for both new and experienced leaders, it has especially sought to leverage its reach with podcasts, webcasts, and webinars. In addition, it has created a broad range of publications, on-line resources, and in-person and virtual training programs to promote fair employment practices and workplace civility that supplement court-sponsored training and materials.

RECOMMENDATIONS FOR ADDITIONAL ACTION

While many protections and procedures have been improved, the Judiciary's work is not done. As is the case in all workplaces, the Judiciary must continue to take stock of what it has accomplished and find those areas where more can be done. Accordingly, the Working Group has proposed additional recommendations that would strengthen policies and procedures, expand communication and training, and improve our measurement of progress.

The Working Group recommends a nationwide climate survey, disseminated at regular intervals to all Judiciary employees, to assess the workplace environment and to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements the Judiciary has made to its policies and processes.

A continuing focus has been to build confidence and trust in the changes that already have occurred and that will occur. Building that trust requires a clear

explanation of how we are addressing workplace misconduct. We have done so with training and awareness at all levels, including nationwide and locally, to include judges and Judiciary employees. The working group recommends strengthening annual EDR training. A related recommendation – to expand outreach and engagement – will help circuits fully understand employee concerns.

Another element of trust is regular reporting. The Working Group recommends including data collection related to Informal Advice contacts and recommends issuing an annual Judiciary workplace conduct report.

Confidence is further enhanced by ensuring fair and impartial procedures. The Working Group is further proposing that, in addition to existing recusal requirements, the Judiciary's policies be enhanced to specify that an employee complaint must be overseen by a judge from outside the court from which the complaint originated.

Another key imperative for creating a safe workplace is effective policies and procedures, using clear and plain language. The working group recommended additional policy enhancements. These include assessing incorporation of additional monetary remedies as part of the EDR complaint process; developing a system for regular review of the Judiciary's workplace conduct policies to ensure comprehensive implementation across courts and circuits; and adopting an express policy regarding romantic relationships that exist or develop between employees

where there is a supervisory or evaluative relationship.

The Working Group's most recent recommendations report are listed below:

- Recommendation 1: Conduct a nationwide climate survey, disseminated at regular intervals to all Judiciary employees, to assess the workplace environment and to provide insight into the prevalence of workplace conduct issues and the impact and effectiveness of the improvements the Judiciary has made to its policies and processes.
- Recommendation 2: Augment annual EDR-related data collection to include data related to Informal Advice contacts, while ensuring that confidentiality is protected.
- Recommendation 3: Enhance the Formal Complaint process by revising the Model EDR Plan to specify that an employee complaint must be overseen by a Presiding Judicial Officer from outside the court from which the complaint originated.
- Recommendation 4: Develop an express policy regarding romantic relationships that exist or develop between employees where there is a supervisory or evaluative relationship. The policy should apply to all Judiciary employees and judges.
- Recommendation 5: Assess incorporation of additional monetary remedies as part of the EDR complaint process.
- Recommendation 6: Direct the Office of Judicial Integrity, with the assistance of the Directors of Workplace Relations, to issue an annual Judiciary workplace conduct report.
- Recommendation 7: Expand Outreach and Engagement.
- Recommendation 8: Strengthen annual EDR training by revising the Model EDR Plan to emphasize that courts and employing offices have a responsibility to ensure that EDR training is offered and accessible to all employees and judges on an annual basis, and to take affirmative steps to ensure completion.

- Recommendation 9: Develop a system for regular review of the Judiciary’s workplace conduct policies to ensure comprehensive implementation across courts and circuits.

CONCERNS REGARDING THE JUDICIARY ACCOUNTABILITY ACT

Solutions that work must account for the unique needs and governance of a particular workplace, which for the Judiciary includes a dispersed, regionalized structure. Individual courts at the district and circuit levels possess significant administrative autonomy, including the authority to address employment and workplace conduct matters. We have established a system that empowers employees to seek advice and guidance from experts at the local, regional, or national level, and empowers them to seek resolution through informal advice, assisted resolution or a formal complaint procedure. This is more likely to be used and to be more effective than a single national oversight body.

The Judiciary’s approach of establishing DWRs at each circuit, training and empowering EDR coordinators in each court, and requiring the courts to provide annual training for every judge and employee, matches well with the Judiciary’s decentralized governance and culture. The Judiciary Accountability Act of 2021 (JAA) would reorganize the workplace misconduct program as a national centralized structure that operates outside of the Judicial Conference and the purview of the courts. A centralized structure, as proposed by the JAA, would

provide no mechanism for the Judicial Conference, the courts, or other judicial branch entities to influence or provide input regarding the workplace misconduct prevention program, which could result in policy and programmatic decisions that lack an essential understanding of the unique character of each court and unit. For example, the JAA fails to acknowledge the fundamental differences between FPDOs and other Judiciary units. Yet, such differences led the Judicial Conference to approve a separate EDR plan for FPDOs. The JAA's approach to distancing leaders at the top and its failure to focus on the unique needs of a particular workplace, in this instance the individual courts, is unworkable and unwise.

The JAA proposes to replace existing judicial branch personnel at the local, circuit-wide, and national levels with individuals who are employed by a "judiciary" entity that is centralized at the national level and does not operate under the supervision or direction of a circuit council, the Judicial Conference, or the AO Director. The Judiciary's internal governance system is a necessary corollary to judicial independence. Accordingly, the Judicial Conference has serious concerns that this arrangement would infringe on judicial branch self-governance, undermine the integrity of the branch, threaten the independence of judicial decision making, implicate judicial autonomy, or impair the administration of justice.

By inserting Congress and the Executive Branch within internal Judiciary governance, in the form of a Commission with vast reporting and investigative authorities, including subpoena powers, appointed by and in continual communication with the political branches, the JAA creates a risk that it could be used by the political branches or others to influence, intimidate, harass, or punish judges, or could target its investigative resources at judges based on their decisions, perceived political affiliations, or the party of their appointing president.

Beyond judicial governance concerns, the construct of the JAA removes avenues for reporting misconduct, possibly discouraging reporting. Some employees might be hesitant to report misconduct to a national, centralized entity, rather than within the familiar ambit of their particular court or circuit. The Judicial Conference would not favor legislation to the extent that it would centralize the reporting and processing of workplace misconduct claims (including claims that could potentially lead to judicial conduct and disability proceedings), contrary to best practices, as recommended by the EEOC, which emphasize the importance of multiple advice and reporting options. Centralizing the reporting and processing of workplace misconduct claims would unduly hinder many Judiciary employees from coming forward to report misconduct.

The Judiciary's approach – creating a national, regional, and local networks to receive workplace conduct reports – means multiple resources are fully

accessible to all employees, who can choose the communication path that feels safest to them. Employees should have the option to utilize the avenue they are most comfortable pursuing. Local reporting options provide access to and availability of knowledgeable individuals who can assist with oftentimes complicated and sensitive issues. This is far more effective than one centralized national office.

The JAA's approach to confidentiality is another area of concern. The legislation imposes extensive public reporting requirements that could compromise confidentiality. The Judiciary's recommendation is that data should be collected at a high level (e.g., only the number of contacts), to avoid even the perception that the strong confidentiality protections attached to providing informal advice might be lessened by the collection of court- or allegation-specific data.

Another element of confidentiality relates to ethics advice. The Judicial Conference opposes any legislative proposal that permits any entity other than the Committee on Codes of Conduct (Codes Committee) to provide confidential ethics advice to judges or employees because it infringes on the Committee's authority and may create confusion within the Judiciary. Unlike the Codes Committee, which includes a member judge from every judicial circuit as well as a magistrate judge and bankruptcy judge member, it is doubtful that most members of the Commission proposed by the JAA would have sufficient familiarity with judicial

ethics and the various adjudicative and administrative responsibilities that come with being a judge. To the extent that any office created by the JAA would have the authority to provide advice regarding the Codes, this would interfere with the Codes Committee's authority to provide such advice and could lead to a judge or employee receiving conflicting guidance.

Similarly, the Judicial Conference opposes any provision that authorizes any entity to issue subpoenas without an exception for the Codes Committee's advice because it imposes an intrusive requirement that would interfere with existing policies and procedures regarding the confidentiality of ethics advice and may undermine the role of the Committee by discouraging judges and employees from seeking guidance. If a judge or employee knew that the Committee's confidential advice might be subject to a subpoena as part of a workplace conduct investigation, then the judge or employee might be reluctant to seek the Committee's advice to resolve workplace conduct matters.

A third aspect of confidentiality concerns judicial conduct and disability proceedings. The JAA would amend the JC&D Act to require the Judicial Conference to provide to Congress its determination and the record of the proceedings where it affirms or imposes remedial action on a subject judge (and not only when there is a referral to Congress for consideration of impeachment). Furthermore, the bill would give power to various officials created by the

legislation to obtain all information or subpoena materials related to judicial conduct and disability proceedings. Such provisions threaten the confidentiality of judicial conduct and disability proceedings, which could impact decisional independence and be a deterrent to reporting.

In many regards, the JAA includes provisions that are duplicative of current judiciary processes. For example, under the JAA, the Commission and associated offices would recommend to the Judicial Conference, every four years, revisions to the Codes of Conduct for United States Judges, Judicial Employees, and Federal Public Defender Employees. This creates a structure that unnecessarily duplicates the work of the Codes Committee, and the Judicial Conference does not support this provision.

The Judicial Conference further opposes the bill to the extent it essentially codifies—and to some extent duplicates—existing procedures under the JC&D Act and Rules, which may limit the Judiciary’s flexibility to amend its procedures to account for changing circumstances or future developments.

Beyond duplication of effort and loss of flexibility, the Judicial Conference has additional concerns related to JAA provisions that substantially alter the Judicial Conduct and Disability process so that it would no longer adequately reflect judicial self-regulation and independence. The inclusion of members of a Commission appointed by or in consultation with the executive and legislative

branches on JC&D special committees and judicial councils would undermine judicial self-regulation and independence and would unnecessarily insert the political branches into the realm of judicial discipline.

Furthermore, the JAA threatens to undermine the delicately crafted incentive structure Congress established in the JC&D Act that encourages judicial resignation in appropriate circumstances – by amending the JC&D Act to exclude a judge’s resignation, retirement, or death as grounds for dismissal or conclusion of a JC&D complaint. Because only Congress can remove Article III judges through impeachment proceedings, and because it is a time and resource intensive process that is rarely invoked, a structure that encourages judges to resign when allegations of judicial misconduct are determined to be valid is beneficial to society at large, and to the Judiciary in particular.

The Judicial Conference opposes the JAA to the extent that it establishes a broader scope of workplace protections for the Judiciary than those applicable to other branches of government. The bill would extend workplace and whistleblower protections to categories of individuals with whom the Judiciary does not have an employment relationship, and which are not covered by workplace protections applicable to other branches of government and the private sector.

CONCLUSION

The Judiciary has built an exemplary workplace and is committed to sustaining it. The Working Group will continue to monitor and assess workplace conduct matters throughout the Judiciary, to assist with continued implementation of the workplace initiatives already in place, and to recommend additional changes whenever it sees needs for improvement.

While the Judiciary has made significant strides and improvements, and has done so expeditiously, some changes do not occur overnight. This is a continuing effort, and we expect some cultural changes will need time to take root. However, the Judiciary's process for protecting employees is demonstrating its promise and should be given time to build upon the significant strides made to date. Making premature or sweeping changes could undo several years of steady improvement, with no assurance that alternatives would lead to an improved workplace, more reporting, greater employee trust, or more effective responses to complaints.

The positive effects of the protections and improved process have already begun to take hold. The Judiciary looks forward to even greater improvements that will further enhance the fairness, dignity, and respect with which we treat our employees.